

Exhibit C
Junior DIP Hearing Transcript

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 November 27, 2018

17 1:30 PM

18

19

20

21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN

Page 2

1 HEARING RE: Notice of Agenda of Matters Scheduled for
2 Hearing on November 27, 2018 at 1:30 p.m.

3

4 Motion to Approve Debtor in Possession Financing / Debtors
5 Motion for Authority to (A) Obtain Post-petition Financing,
6 (B) Use Cash Collateral, (C) Grant Certain Protections to
7 Prepetition Secured Parties, and (D) Schedule Second Interim
8 Hearing and Final Hearing (document #5)

9

10 Motion to Authorize/ Motion of Debtors For Authority to (I)
11 Continue Using Existing Cash Management System, Bank
12 Accounts, and Business Forms, (II) Implement Ordinary Course
13 Changes to Cash Management System, (III) Continue
14 Intercompany Transactions, and (IV) Provide Administrative
15 Expense Priority for Post-petition Intercompany Claims and
16 Related Relief (document #5)

17

18 Supplemental Motion to Approve Debtor in Possession
19 Financing / Debtors Supplemental Motion for Authority to (I)
20 Obtain Junior Post-petition Financing and (II) Schedule
21 Final Hearing filed by Sunny Singh on behalf of Sears
22 Holdings Corporation (document #872)

23

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Page 3

1 Statement: Notice of Filing of Superpriority Junior Lien
2 Secured Debtor-In-Possession Credit Agreement (related
3 document(s) 7, 872) filed by Sunny Singh on
4 Behalf of Sears Holdings Corporation (document #881).

5

6 Statement: Notice of Filing of DIP Intercreditor Agreement
7 (related document(s) 881, 7, 872, 885, 744) filed by Sunny
8 Singh on behalf of Sears Holdings Corporation (document#892)

9

10 Motion to Authorize /Motion of ESL Investments, Inc. for the
11 Entry of an Order Pursuant to Bankruptcy Code Section 105
12 and Federal Rules of Bankruptcy Procedure 2004, 9006 and
13 9016 Authorizing Expedited Discovery of the UCC and
14 the Subcommittee, dated November 21, 2018 (document #854)

15

16 Objection /Limited Objection of the Official Committee of
17 Unsecured Creditors of Sears Holdings Corporation, et al, to
18 ESL Investments, Inc. Motion Seeking Expedited Discovery
19 (related document(s) 854)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 P R O C E E D I N G S

3 THE COURT: Please be seated. Okay, good
4 afternoon. In RE: Sears Holdings Corp.

5 MR. SINGH: Good afternoon, Your Honor. Sunny
6 Singh, Weil Gotshal, on behalf of the Debtors.

7 Your Honor, thank you very much to you and your
8 chambers for allowing the parties the additional time to
9 finalize some of the negotiations.

10 We do have some updates here and I'm pleased to
11 report to the Court that we have a resolution with the
12 Unsecured Creditors Committee on its objection, and I'm
13 going to outline the terms of that resolution which has been
14 accepted by the key parties in interest and I will outline
15 as we go through this.

16 One key development that I would like Your Honor
17 to be aware of right up front is we had bidding for the
18 junior DIP, not surprisingly, literally outside in the
19 hallway for the last hour, so --

20 THE COURT: Okay.

21 MR. SINGH: And with both parties here active
22 bidding and getting real-time feedback from the Committee's
23 professionals.

24 So one thing I would like to update the Court and
25 the parties, is that we do have a new DIP lender on a junior

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1 DIP basis. It's going to be Cyrus and they have agreed to
2 modify certain key terms of the junior DIP financing package
3 that was proposed and filed with the Court.

4 And, Your Honor, I do apologize. I'm literally
5 scribbling together some notes here and on my iPad which I'm
6 grateful I was allowed to bring in.

7 THE COURT: Okay. Are they using the same
8 structure that had previously --

9 MR. SINGH: Yes.

10 THE COURT: -- been the one that was proposed?

11 MR. SINGH: That's right, Your Honor. What I'm
12 about to read are literally the only changes that we've
13 agreed, which are all favorable to the Debtors with respect
14 to the structure. Everything else is the exact same
15 structure in terms of the sharing of liens with respect to
16 the specified collateral, where they fit into the collateral
17 stack on all of the other unencumbered -- previously
18 unencumbered property and previously encumbered property.

19 So in addition, Your Honor, we did file yesterday
20 -- and I believe Your Honor has a copy -- a copy of the
21 junior DIP credit agreement --

22 THE COURT: Right.

23 MR. SINGH: -- and that's at ECF Number 881, I
24 think. Yes, 881. And they have agreed that they will be
25 living by the terms of that particular document and have

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1 agreed to deliver signatures on that document, subject
2 obviously to conforming the deal points that I'm about to
3 read in here, changing names, and of course I think the UCC
4 just given where everything was getting filed, wants to make
5 sure and take a look that the deal's being implemented as
6 we're about to outline here today.

7 THE COURT: Okay.

8 MR. SINGH: So really, the only changes are the
9 ones I'm about to read that are of any substance.

10 So, Your Honor, the pricing has been reduced by
11 150 basis points from L plus 1150 to L plus 1000. The
12 winddown account, which was originally at \$200 million, has
13 been increased to \$240 million to the benefit of the
14 Debtors.

15 There's language in the agreement with Great
16 American that requires their signoff to the retention of the
17 liquidator with respect to any remaining stores and the
18 reasonable consent of what was previously for Great
19 American.

20 Cyrus has agreed that that consent right will
21 instead be changed to simply consultation rights with the
22 estate. The budget variance, Your Honor, as you may have
23 seen in the UCC's objection and under supplemental
24 objection, that was an open issue where the UCC was
25 requesting a fixed \$42 million variance instead of a

1 percentage variance, and Cyrus has agreed to the UCC's
2 construct, so that will need to be built in.

3 THE COURT: So that would be a fixed \$42 million?

4 MR. SINGH: That's right, Your Honor.

5 THE COURT: Okay.

6 MR. SINGH: And then finally, there is an
7 agreement on adequate protection that Your Honor -- with
8 respect to the second liens -- and just to outline that
9 issue for the Court, the UCC in its supplemental objection
10 had raised the issue that -- I'm just going to focus for a
11 minute on the 2L adequate protection package because they've
12 raised this issue with others, but I think we're resolved
13 with the 1Ls and the DIP, on different terms.

14 So with respect to the 2Ls, the UCC wanted to
15 limit adequate protection claims to the prior obligors under
16 the prepetition debt instruments and not to extend that to
17 unencumbered collateral at those obligors but also any new
18 obligors that are debtors and providing adequate protection.

19 So the parties have agreed, and Cyrus is a
20 material holder with respect to the second lien notes, and
21 ESL holds a substantial majority of the second lien credit
22 agreement dollars that are -- the indebtedness there, so all
23 parties have agreed and willing to direct their Trustees to
24 the following, Your Honor, that the adequate protection
25 liens will be limited to the prior obligors and will not

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1 extend to new obligors or new debtors, I should say, but
2 they will get adequate protection liens on existing
3 collateral, so primarily inventory, but also previously
4 unencumbered collateral at those particular Debtor entities
5 that were previously --

6 THE COURT: The obligor entities?

7 MR. SINGH: That's right. At the obligor
8 entities. And they agreed that they will marshal so that
9 they will first look to recoveries from the prepetition
10 collateral so basically inventory and then only look to the
11 remaining collateral.

12 On the intercompany -- the UCC had also raised
13 that intercompany claims or intercompany transfers of value
14 that are going -- for example by Sears Roebuck to one of the
15 other entities -- those transfers will occur on a secured
16 basis. They'll be junior in priority to the DIP ADL liens,
17 the junior DIP liens, and the first lien, adequate
18 protection liens but then they will sit right there on top
19 so that in the event of a meltdown, which we are hoping to
20 avoid, but that was a scenario that the Committee was
21 concerned about, you would have value in cash transferred
22 back to the lending entity so that all of the parties in
23 interest sort of maintain status quo and that value is
24 coming back.

25 You know, that was a key point for the second lien

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1 parties to limit their claims to the adequate protection at
2 their primary obligors -- their existing obligors, both
3 primary and guarantors.

4 THE COURT: Right.

5 MR. SINGH: Your Honor, in addition, the Debtors
6 and the UCC have agreed that we will undertake in good faith
7 to allocate expenses including professional fees to the
8 various boxes, to the various Debtor entities so that there
9 is an accurate claim tracking going on, on an intercompany
10 basis and we're not just literally focused on money out the
11 door. And so --

12 THE COURT: So it's not just -- it's not limited
13 to professional fees, but --

14 MR. SINGH: It's all expenses.

15 THE COURT: -- track all the intercompany --

16 MR. SINGH: -- activity.

17 THE COURT: -- transfers and have an equitable
18 adjustment of them that would include professional fees?

19 MR. SINGH: That's exactly right, Judge.

20 THE COURT: Okay.

21 MR. SINGH: And we have also agreed that we'll
22 make sure -- from a timing perspective, we don't need to do
23 that now. It really becomes an issue --

24 THE COURT: Well, you have to have the --

25 MR. SINGH: The mechanics.

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1 THE COURT: The mechanics in place.

2 MR. SINGH: That's exactly right. So we've agreed
3 that we will put the mechanics in place so that we can do
4 that in good faith if and when we need to later in the case,
5 but we're not actually going to do the exercise today. We
6 would only do it if -- but we're committing in good faith,
7 us and the Committee, that we will do it if it becomes
8 necessary.

9 THE COURT: Right.

10 MR. SINGH: You know, and wouldn't try to --

11 THE COURT: And I'm assuming there's some
12 reporting mechanism on the mechanics, so that --

13 MR. SINGH: Yes --

14 THE COURT: -- everyone's comfortable that it's
15 being tracked?

16 MR. SINGH: That's right, Judge.

17 THE COURT: Okay.

18 MR. SINGH: And the company does track it. You
19 know, currently, there is an allocation of expenses, non-
20 professional fee expenses going on, so I think we have to
21 share that with all the parties to make sure they're
22 comfortable. But that is a key part of the deal, so we
23 think we can do that.

24 The other couple of pieces that I would mention,
25 Your Honor, there was a -- the UCC had filed an objection to

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1 consideration of adequate protection to Cascade or for the
2 Cascade piece. This is the real estate loans. I don't know
3 if you have your chart, but this is the real estate loans
4 where Cascade held about \$108 million on the 88 real estate
5 properties.

6 THE COURT: Right.

7 MR. SINGH: And so it's Note A and B there, so not
8 the \$723 million that's primarily held by ESL. There's no
9 adequate protection there. What we're talking about,
10 really, is the sort of the senior piece of that instrument.
11 We've agreed to provide to pay professional fees of
12 Debevoise. We've agreed to pay post-petition interest on a
13 current basis on the \$108 million Cascade piece. The number
14 may have changed on that particular piece. And then we've
15 also agreed that we'll maintain insurance and maintain those
16 properties.

17 We're only seeking that relief today, Judge, on an
18 interim basis and we would come back at the final junior DIP
19 hearing to seek relief on a final basis with respect to that
20 piece, but we'll start making the payments, et cetera. But
21 the UCC and other parties just wanted time to evaluate the
22 circumstances surrounding that loan.

23 THE COURT: Okay. And the payments are subject to
24 reallocation if --

25 MR. SINGH: Yes.

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1 THE COURT: -- they're not over secured?

2 MR. SINGH: Exactly. Of course. It's still got
3 the same built-in mechanics that we've got for everybody
4 else, you know, consistent with the local rules and your
5 prior orders that would occur.

6 And Your Honor, the other issue is that the -- for
7 adequate protection, the second lien notes indentured
8 Trustee. Their counsel fees represented by the Seyfarth
9 firm would be paid up to \$250,000 total, you know, for the
10 case but they would also preserve any charging liens or
11 claims to come in and ask for more, but the Debtors are
12 agreeing today that they would pay those fees as part of the
13 adequate protection package, up to 250.

14 So, Judge, that outlines where we are with the
15 updated junior DIP part of the UCC's objection.

16 THE COURT: Can I just interrupt you for a second?

17 MR. SINGH: Yes.

18 THE COURT: The 240 -- the increase of the
19 winddown account to \$240 million, that's just -- that
20 applies to the ABL, too?

21 MR. SINGH: It does, Judge, but I should say that
22 they are finalizing, conferring with their clients. This
23 literally just happened, so we need to get their signoff to
24 that piece, but it would apply to both and we're just
25 waiting for their confirmation that that would be --

Page 23

1 THE COURT: Okay.

2 MR. SINGH: -- estate as to both loans.

3 THE COURT: All right. So let me just pause for a
4 minute. Obviously, there are multiple parties involved in
5 those discussions. To each of you, is that a fair summary
6 of the resolution of your issues?

7 MR. DUBLIN: Good afternoon, Your Honor. Phil
8 Dublin, Akin Gump, proposed counsel to the Committee.

9 Everything Mr. Singh said is accurate. As he
10 mentioned, we have not had a chance to go through all of the
11 different documents that have been filed overnight and
12 throughout the day today which, based on our discussions,
13 have incorporated resolution of other issues that we raised
14 in our original and supplemental objection, so we just need
15 time after the hearing, obviously, in order to go through
16 those documents and provide any additional comments --

17 THE COURT: To put it differently, this deal
18 doesn't change any prior deals that the Debtor had made with
19 the Committee to resolve a number of Committee objections
20 beforehand.

21 MR. DUBLIN: That's correct, Your Honor.

22 THE COURT: Okay. And you just want to, obviously,
23 see the documents to confirm all that.

24 MR. DUBLIN: Correct.

25 THE COURT: Okay.

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1 MR. KRELLER: Good afternoon, Your Honor. Thomas
2 Kreller of Milbank, Tweed, Hadley, and McCloy on behalf of
3 Cyrus.

4 Your Honor, I will confirm Mr. Singh has
5 accurately summarized the terms of the junior DIP financing
6 that Cyrus has agreed to enter into as well as the
7 arrangements with respect to the adequate protection for the
8 second lien debt in connection with the other --

9 THE COURT: Let me just -- one document that
10 wasn't mentioned, and I got it quite recently, although it
11 seemed to be pretty plain vanilla -- was the DIP
12 intercreditor agreement. Does the Cyrus junior DIP also
13 just basically take over that intercreditor agreement?

14 MR. SINGH: Yes, Your Honor. That's the
15 intention. I think there may be some adjustments --

16 THE COURT: Got to change the names, but...

17 MR. SINGH: Well, yeah, but they also hold some of
18 the prepetition debt, so we'll just need to work through
19 them to make sure that there's clean carveouts, but that
20 concept is supposed to be in.

21 THE COURT: Right.

22 MR. SINGH: And one of the most important changes
23 there is also in the final DIP order. The UCC had raised
24 the objection that this marshaling concept where -- that the
25 ABL is going to look first to their inventory, cash, et

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1 cetera and the primary collateral, that was really only in
2 the intercreditor agreement. We've now built it into the
3 order in Paragraph 13 of the revised final DIP order, and we
4 have included in there that the Debtors and their estates
5 have the ability to actually enforce that provision which
6 was always intended.

7 THE COURT: Okay.

8 MR. SINGH: So it's going to be consistent with
9 that very important mechanic, and so that's part of, also,
10 the resolution with the UCC.

11 THE COURT: Okay. Can I -- let me just clarify
12 one other thing because you mentioned that Cyrus has
13 prepetition claims. This was one of my questions about the
14 Great American DIP. It had language in it about a release
15 acceptable to them and I'm assuming that that release goes
16 to the DIP --

17 MR. SINGH: Right.

18 THE COURT: -- not to prepetition --

19 MR. SINGH: That's right, Judge. And Cyrus -- you
20 know, they can confirm. There is no file of 6(c) waiver,
21 552 marshaling --

22 THE COURT: Right.

23 MR. SINGH: -- waiver from the Debtors' estates
24 with respect to Cyrus or, frankly, anybody outside of the 1L
25 and none of those issues or releases are intended to pick up

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1 anybody other than in their capacity as a DIP lender.

2 THE COURT: Okay.

3 MR. SINGH: Right, so those issues are open on the
4 table and I'm excluding in this summary, obviously, the ABL
5 lenders --

6 THE COURT: Right.

7 MR. SINGH: -- who have different rights. But as
8 to the prepetition, non-ABL term loan lenders, non-senior
9 lenders, I should say, it's all rights are reserved with
10 respect to that, and we do have some cleanup changes because
11 some parties did raise some issues there to make sure that
12 that's how we were handling it.

13 THE COURT: Okay.

14 MR. SINGH: So, Judge, just a couple of other
15 points that I do --

16 THE COURT: Well, you have some people standing up
17 behind you.

18 MR. SINGH: Sorry --

19 THE COURT: I -- so far, this is just dealing with
20 the changed --

21 MR. SINGH: Yeah.

22 THE COURT: -- terms that are before me. I know
23 there are probably still some people that want to speak on
24 their objections or --

25 MR. SINGH: Yeah.

1 THE COURT: -- resolution of their objections.

2 But let me just give you the chance to organize that aspect
3 of the hearing before we --

4 MR. SINGH: Yeah, Your Honor, I'm just --

5 THE COURT: -- move to the rest of it.

6 MR. SINGH: -- going to finish laying out a couple
7 terms for the resolution with the UCC.

8 THE COURT: Okay.

9 MR. SINGH: And then I'm happy to turn it over,
10 and I will note that we have not resolved every other
11 objection. You know, people will have to stand up here.
12 We've tried. I think we've done a good job --

13 THE COURT: Okay.

14 MR. SINGH: -- but I don't think we resolved
15 everybody. So just a couple of the other pieces on the
16 Debtor settlement with the UCC, and this also addresses the
17 senior DIP loan. So we talked about reverse marshaling, the
18 concept that they will (indiscernible) there, and we built
19 that into the order. We talked about adequate protection
20 for the second liens. The winddown account, we talked
21 about, is going to go to \$240 million. Post-petition
22 intercompany claims, we've talked about that they will be
23 secured.

24 There was also -- UCC had made a request that the
25 ESL, the definition, be consistent to include affiliates of

1 ESL which were dealt with in the cleanup changes to the
2 order, that there's no -- they wanted confirmation that
3 there's no 506(c) waivers and 552 provisions and marshaling
4 which I've outlined for Your Honor with respect to anybody
5 other than the DIP lenders or the 1L lenders, the senior
6 prepetition lenders, that that's not occurring. I think
7 we've said it probably four or five places now between the
8 two orders.

9 The syndication of the DIP, you know, there's
10 clearly a prohibition that ESL and its affiliates are not
11 going to participate in the DIP. That includes the Cyrus
12 DIP, Your Honor.

13 THE COURT: These are now provisions that I got a
14 black line of.

15 MR. SINGH: That's right.

16 THE COURT: Okay.

17 MR. SINGH: I'm just reciting them so that you
18 know that that's still --

19 THE COURT: So everyone is aware.

20 MR. SINGH: Everyone is aware, that this was filed
21 this morning, but again, I'm reciting also the UCC wants to
22 make sure that this lines up just so you have the complete
23 record.

24 THE COURT: Okay.

25 MR. SINGH: We've cleaned up the priority and

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1 extent of the DIP ABL liens and adequate protection
2 consistent with all the changes that I've outlined. The
3 carveout, Your Honor, it's going to be increased to account
4 for Houlihan Lokey's success fees at \$7.5 million. I think
5 the Committee's going to probably file their retention
6 applications and we'll see the engagement letter. Senior
7 lenders do want to see that.

8 And then total expenses, nonlegal, not retention
9 of Committee members, but their out-of-pocket expenses will
10 be capped at \$200,000 in the aggregate, and then I've
11 outlined for Your Honor also the change to the budgeting.
12 We're going to \$42 million fixed, and that applies both to
13 the Cyrus junior DIP and it also applies to the senior DIP
14 with the ABL lenders, so there'll be consisting budget
15 testing and variance.

16 Okay. I think that summarizes the terms of the
17 settlement unless I've forgotten anything, and I'll let
18 other parties speak to that issues, Your Honor, and then I
19 think once we're done with some of these key issues on the
20 UCC, I can stand up and address the landlord objections, the
21 vendor objections, you know, by category and where we are.
22 I think we're very far along with a lot of them.

23 THE COURT: Okay.

24 MR. SINGH: And maybe we'll do that.

25 THE COURT: Well, what I suggest is that if there

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1 -- as you just stated with the Creditors Committee, if there
2 are resolutions to objections that you want to put on the
3 record, do that and then just lay the foundation for the
4 motion otherwise which would be the two declarations --

5 MR. SINGH: Yeah.

6 THE COURT: -- and --

7 MR. SINGH: Certainly.

8 THE COURT: And the like.

9 MR. SINGH: If you give me just one moment to
10 confer with my colleagues.

11 THE COURT: Okay.

12 MR. SINGH: Your Honor, there's just a few, other
13 than the ones that we outlined in the reply. I think it's
14 safe to say that all of the landlord issues -- unless
15 there's any landlord here that corrects me -- have been
16 resolved by the language in both the senior DIP order and
17 the junior DIP order that deals with, you know, liens of
18 these proceeds unless permitted by the nonapplicable
19 bankruptcy law or the lease itself and the exercise of
20 remedies.

21 We had been sharing that with a number of
22 landlords and I have not heard, so I think that category of
23 objections, unless somebody stands up to correct me, has
24 been resolved.

25 THE COURT: Okay, so let me just ask. Are there

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1 any landlords or landlord-like parties who filed objections
2 that believe they're not resolved by the paragraphs dealing
3 with clarifying that the liens are on -- proceeds are not on
4 the leases unless permitted by the documents and also have
5 the various ways or limitations on the lender's ability to
6 exercise rights with respect to collateral in the leased
7 property, or any other objections by the landlords?

8 MS. BENNETT: Your Honor, Teresa Bennett on
9 telephone.

10 THE COURT: Yes.

11 MS. BENNETT: I --

12 THE COURT: I'm sorry, could you just -- I didn't
13 catch who you were appearing on behalf of.

14 MS. BENNETT: Sure. It's Aviation Mall NewCo,
15 LLC; Holyoke Mall Company, LP, JPMG Manassas Mall Owner,
16 LLC; Poughkeepsie Galleria, LLC; Salmon Run Shopping Center,
17 LLC; S&R Company of West Seneca NewCo, LLC; DGI LS, LLC; and
18 (indiscernible) Plaza, LLC.

19 THE COURT: Okay.

20 MS. BENNETT: We agree that there was language
21 inserted into the proposed order that we're agreeable, but
22 the proposed orders that were filed this morning seem to be
23 inconsistent.

24 So first, it includes in the definition of
25 excluded property the leases of real property and includes

1 only the proceeds of such leases. But then if you go
2 further down that paragraph, it says that the included
3 property only includes those leases to the extent that the
4 creation of the lien on such properties -- only to the
5 extent that the lease expressly prohibits lease, so I think
6 that's inconsistent in both the senior and the junior order.

7 THE COURT: I think it's usually phrased the other
8 way around, right, that unless under applicable non-
9 bankruptcy law a lender would have the right to a lien?

10 MR. SINGH: Yeah, Your Honor, I just double
11 checked it because we actually did focus on this particular
12 issue. In the senior DIP order, it's Paragraph 13. It does
13 say, except as permitted in the lien and applicable and the
14 same language appears in the version filed of the junior DIP
15 order at ECF 891, again, at Paragraph 12. They both say,
16 except as permitted.

17 THE COURT: Except as permitted, as opposed to the
18 --

19 MR. SINGH: The opposite --

20 THE COURT: All right. I'm not sure that where
21 you have -- I mean, that's the way it should be, unless
22 permitted under applicable law or by the parties'
23 agreements.

24 MR. SINGH: Right, which is what we have in both
25 unless --

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1 THE COURT: Okay.

2 MR. SINGH: If she can point us to --

3 THE COURT: All right.

4 MS. BENNETT: if you look at Page 164 of that
5 document, 891 --

6 MR. SINGH: Okay. That's the junior DIP order.

7 MS. BENNETT: Correct. And if you go two-thirds
8 of the way down the page, there's a provided provision and
9 it states that provided then in each case, the property
10 described in Clauses (i), it goes on to say such properties
11 shall constitute an excluded property only to the extent
12 that for so long as such contract lease license or other
13 applicable law prohibits the creation of a lien on such
14 property, which seems to be inconsistent with the permitted
15 language.

16 MR. SINGH: Yeah, Your Honor, I think she's right.
17 I think that's probably clauses --

18 THE COURT: So you just have to flip that.

19 MR. SINGH: Well, only as to leases, right, I
20 think as to --

21 THE COURT: Yeah.

22 MR. SINGH: -- everything else. So I think we can
23 probably just say -- described in Clauses 2 through 4.

24 THE COURT: That's fine.

25 MR. SINGH: Just take out the --

1 THE COURT: Exclude the reference to leases.

2 MR. SINGH: To leases, because it's -- yeah. And
3 we'll do that in both, if that appears.

4 THE COURT: Okay.

5 MR. SINGH: Okay.

6 MS. BENNETT: Thank you, Your Honor.

7 THE COURT: All right.

8 MR. SINGH: Okay.

9 THE COURT: Anyone else from the landlord group?

10 Okay. It did seem to me that the changes highlighted in the
11 Debtors' brief -- and I appreciate these documents are long
12 and hopefully there's nothing inconsistent -- the intention
13 is clear and I think those do resolve the landlord
14 objections.

15 MR. SINGH: Thank you, Your Honor. Your Honor,
16 then moving -- we had a number of vendor objections and we
17 did include language in the proposed orders that dealt with
18 reservation of rights for reclamation vendors, reservations
19 of rights with respect to setoff and recoupment claims and
20 we did have a number of vendor objections that were
21 remaining outstanding.

22 I think I can report, Judge, that we've been
23 working on reservation of rights language as to particular
24 vendors who may not fit into one of those buckets, but want
25 to primarily preserve prepetition rights that to the extent

1 they have the ability to trace collateral or make claims,
2 that we've got those reservations.

3 So we're working on a reservation but have not
4 quite finished with counsel for Luxottica who is the eye
5 glasses vendor at certain Sears stores, and then also we've
6 got a reservation of rights agreed language with American
7 Greetings that essentially preserves their ability, their
8 prepetition claims and our defenses.

9 I think what we would do is circulate that
10 language to the relevant parties, makes sure the UCC and the
11 lenders were okay with it, and then propose it to Your
12 Honor, but it's simply a reservation.

13 THE COURT: Okay, so this category covers both
14 parties who allege they have consignment status and also
15 reclamation parties?

16 MR. SINGH: Yes, Your Honor, and just a reminder,
17 we deal with the consignment vendors in the GLB order just
18 because of the -- sort of way things went in this case.

19 THE COURT: Right.

20 MR. SINGH: And so that covers the consignment
21 vendors' rights notwithstanding what's entered with respect
22 to the DIP orders.

23 THE COURT: Okay.

24 MR. SINGH: So I don't know if there's anybody
25 else that has an outstanding objection that's a vendor with

1 respect to their --

2 THE COURT: Okay. Are there any parties either in
3 the courtroom or on the phone representing vendor,
4 consignors, or the like who filed objections that wish to
5 speak?

6 MR. GOODMAN: Good afternoon, Your Honor. Eric
7 Goodman, Baker Hostetler on behalf of American Greetings.

8 THE COURT: Right.

9 MR. GOODMAN: I just want to note that as of
10 approximately an hour-and-a-half ago, we had reached an
11 agreement with counsel for the Debtor and counsel for Bank
12 of America regarding reservation of rights language to be
13 included in the proposed DIP order, with that language -- I
14 hope it will be accepted by the UCC, that would be included,
15 that would resolve our issue.

16 THE COURT: Okay. Thank you.

17 MR. PEY: Good afternoon, Your Honor. My name is
18 Chris Pey from Fisher Broyles representing Clover
19 Technologies Group. We raised some objections to the
20 preservation of rights and we liked the statement in
21 Debtors' reply, Document 864, Paragraph 37; but we didn't
22 see that language expressly expressed in the draft order.
23 It is somewhat duplicative of the previous order in this
24 case, but we would appreciate if the consignment vendors'
25 rights --

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1 THE COURT: In addition to being in the GLB order?

2 MR. PEY: Yeah, because if -- there's --

3 THE COURT: Well, let me just ask you, why -- I
4 mean, this DIP order gives the DIP lenders certain rights.

5 How is it clear that notwithstanding those rights, the GLB
6 order -- I'm looking at the Debtors' counsel --

7 MR. SINGH: Yes.

8 THE COURT: Why would -- the GLB order governs on
9 consignment?

10 MR. SINGH: Your Honor, I think we need a sentence
11 in here --

12 THE COURT: You can just say --

13 MR. SINGH: -- their rights --

14 THE COURT: -- that paragraph applies here?

15 That's fine.

16 MR. SINGH: -- in the DIP order are subject to the
17 --

18 THE COURT: That paragraph.

19 MR. SINGH: -- the interim --

20 THE COURT: Yeah.

21 MR. SINGH: I've got it in the interim GLB not
22 notwithstanding anything in the DIP orders, but it's --

23 THE COURT: I think you should put that in.

24 MR. SINGH: Yeah --

25 THE COURT: Just to make that clear.

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1 MR. PEY: I was looking at Paragraph 13, Subclause
2 B.

3 THE COURT: Just incorporate the paragraph from
4 the GLB order into this one, as you've done --

5 MR. SINGH: Yeah, so I think it was that sentence.

6 THE COURT: Yeah. Okay.

7 MR. PEY: Okay. And also that the DIP ABL liens
8 and collateral don't necessarily exclude liens on the
9 proceeds of prepetition consignment sales which may be
10 covered by the agreement that's going to be circulated, for
11 example, with American Greetings which we haven't seen yet.

12 THE COURT: I'm not sure I understand that point.

13 As I understood the American Greetings one, it was basically
14 a reservation of rights as opposed to --

15 MR. PEY: That's what we're looking for.

16 THE COURT: Okay, not a statement that they don't
17 attach, it's just that the parties reserve their rights as
18 to whether they do or not attach.

19 MR. PEY: You're right, Your Honor.

20 THE COURT: Okay. All right.

21 MR. PEY: Thank you.

22 MR. ALLERDING: Good afternoon, Your Honor. John
23 Allerding, Thompson Hine on behalf of Luxottica. As the
24 Debtors' counsel mentioned, our objection is still
25 outstanding but is -- we believe is very close to being

1 resolved. In fact, before today's hearing I had a
2 conversation with Debtors' counsel in which it was
3 represented to us that the language that we sent over
4 earlier this morning is acceptable to the Debtors and the
5 Debtors' counsel as far as the framework goes, the Debtors
6 and the DIP lenders. The Debtors and the DIP lenders need
7 to work out some issues between themselves regarding
8 reporting.

9 That framework would generally, as the Debtors'
10 counsel said, preserve Luxottica's rights, whatever they may
11 be, with respect to prepetition funds that were provided to
12 the debtors under a license agreement would require the
13 segregation of post-petition amounts provided under that
14 license agreement and would clarify that the DIP liens do
15 not attach to the post-petition segregated accounts or
16 amounts, would require -- or would clarify that the DIP
17 liens nor the adequate protection liens apply to Luxottica's
18 inventory and goods which it sells at the Sears Optical
19 locations, and would require the Debtors to comply with the
20 terms of the license agreement pending assumption or
21 rejection of that agreement.

22 Those are the terms as I understood them, and
23 again, I think there was an agreement with respect to those
24 terms. Perhaps some of the language still needs to be
25 worked out.

1 THE COURT: Okay. The only one I'm not so sure
2 about is the last point. I mean, it's an agreement, but I'm
3 not sure what that agreement provides overall, so I think
4 the parties may have to look at that to see what it
5 provides, but certainly as far as making it clear the
6 Debtors cannot grant a lien on property that they don't --
7 it's not property of the estate, that's clear.

8 MR. ALLERDING: Thank you, Your Honor.

9 THE COURT: Okay.

10 MR. SINGH: Yes, Your Honor, and we'll --

11 THE COURT: I mean, remarkably, there are a couple
12 of published opinions that -- where Debtors actually tried
13 to do that, but --

14 MR. SINGH: We know that --

15 THE COURT: -- it didn't work.

16 MR. SINGH: We don't have that issue.

17 THE COURT: Right. In re TMT Procurement Corp.,
18 764 F.3d 512 and in re Packer, 2018 Bankruptcy LEXIS 2143.

19 MR. SINGH: So, Judge --

20 THE COURT: But I don't think you were trying to
21 do that.

22 MR. SINGH: No, no.

23 THE COURT: Okay.

24 MR. SINGH: And I think we'll -- I don't think
25 we'll have an issue finalizing reservation of rights like

1 these parties.

2 THE COURT: Okay.

3 MR. SINGH: If we do, you know, come back and let
4 the Court know. But I think that's it on the -- unless I
5 speak too soon, I think that's it on the vendors.

6 THE COURT: Okay.

7 MR. SINGH: Your Honor, next we just have the
8 objection of the Texas taxing authorities, the review
9 objections. We've basically incorporated the same language
10 that Your Honor approved in prior orders with, you know,
11 modifications to make sure we're referring to the right
12 orders. I think that resolves their objections.

13 THE COURT: Okay. It did seem to me to be the
14 same language, the same mechanism for dealing with their ad
15 valorem, right?

16 MR. SINGH: Yes, that's correct, Your Honor. And
17 then finally I think there were just a few buckets including
18 the School District objection that we did. Spent some time
19 on it in our reply brief. I think the latest is that we are
20 in conversations to try to resolve that objection. We are
21 not resolved, but I think we are in conversations to try to
22 continue to resolve that objection. And, you know, what I
23 would propose is that we continue to talk. And if there is
24 an issue, you know, we can come back to the Court for a
25 determination there. But we don't have an objection to them

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1 preserving rights to assert a constructive trust later as
2 long as people are allowed to object to that. I think
3 that's their primary issue. But I don't mean to speak for
4 them. They're here, they can certainly address the Court.

5 MR. KADISH: Your Honor, for the School District,
6 Allen Kadish --

7 THE COURT: Yes. This is the one in Chicago.

8 MR. KADISH: In Illinois, yes. Allen Kadish --

9 THE COURT: Well, actually it's outside of
10 Chicago.

11 MR. KADISH: -- Archer and Greiner. I'm here with
12 Ken Fleury, who is the principal outside counsel for the
13 School District, and Matt Gensburg, who is going to address
14 the Court if you want to hear from us. We are in
15 conversations. We have tried to reach some reservation of
16 rights and, you know, maintenance of status quo language.
17 We're not there yet. So let me ask Mr. Gensburg to speak.

18 THE COURT: Okay.

19 MR. GENSBURG: Thank you, Your Honor. Matt
20 Gensburg on behalf of the School District. We have had,
21 Your Honor, this morning and late last night some
22 conversations in reservational rights language. And what's
23 been proposed is we're preserving the School Districts
24 rights to assert constructive trust or a senior lien if any.
25 And we appreciate that. Where I was seeking clarity on the

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1 reservational rights language is that nothing in the
2 proposed DIP order would subordinate the interest or liens,
3 if it should be determined that they exist, or primers. And
4 that's the only clarity that I was looking for in --

5 THE COURT: Well, the definition of prior liens
6 says that they're not priming. So I don't think you need
7 that.

8 MR. GENSBURG: Well, so that's clear, Your Honor,
9 among the parties and the Debtors and the Court --

10 THE COURT: Right.

11 MR. GENSBURG: -- that with this reservation of
12 rights, the ability, if it should exist -- and that will be
13 determined. We have a pending motion to modify the stay
14 with Your Honor set for December 20th. Because this action
15 was actually brought in Illinois pre-petition. But it's
16 understood by all the parties that if we have an ability to
17 and an interest in a constructive trust or if the real
18 estate taxes that are involved are priming taxes, which they
19 are in Illinois, that nothing in the court orders today or
20 whenever they're entered will subordinate or prime us, then
21 we're fine.

22 THE COURT: All right.

23 MR. GENSBURG: But when I read it, I just saw
24 ambiguity there and I wanted clarity.

25 MR. SINGH: Your Honor, if I may. We're happy to

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1 stipulate, Your Honor. They either are a permitted prior
2 lien or they're not. Okay?

3 THE COURT: Right. If it's a prior lien, then
4 it's senior by definition.

5 MR. SINGH: Right.

6 THE COURT: So I don't think you need the other
7 language.

8 MR. SINGH: Right.

9 THE COURT: That just leads people to ask what
10 that other language adds. And I think if it is a priming
11 lien, your lien is a priming lien, then it would be a prior
12 lien under the definition in the DIP agreement. And if you
13 are able to establish a constructive trust, then by
14 definition it wouldn't property of the estate, and they
15 can't grant a lien on it under the cases I just cited. So I
16 think you're covered.

17 MR. GENSBURG: Thank you, Your Honor. And that's
18 where we are. So I think with this record maybe it should
19 be pretty easy --

20 MR. SINGH: I'm not even sure we need -- well, we
21 can have the language, but I think we're good.

22 THE COURT: Well, you just want to say that the
23 grant of this lien doesn't -- that the School District's
24 right to allege a prior lien or a constructive trust is
25 fully preserved.

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1 MR. SINGH: Right, and the Debtor's rights to
2 object are preserved.

3 THE COURT: To object are fully preserved.

4 MR. GENSBURG: So we'll work on that language
5 together.

6 THE COURT: Well, all parties rights to object are
7 fully preserved.

8 MR. SINGH: Yes, right.

9 THE COURT: Right.

10 MR. SINGH: All right. We can work on it. I
11 think we just said we can work on it. Thank you.

12 MR. TABACHNIK: Your Honor, Douglas Tabachnik
13 here.

14 THE COURT: Yes. You're here for the Texas ad
15 valorem group.

16 MR. TABACHNIK: Yes, Your honor. One half of that
17 group. Your Honor, I just wanted to point out one thing
18 that might help in all of this. Because as I was going
19 through this, you can't help but notice in the tax order
20 that was entered at docket #116, there's a provision at #5
21 that says that the extent of any inconsistencies between the
22 DIP order and this order provided by the payment of taxes,
23 the DIP order is going to control. And the DIP order is
24 fine as long as the taxes are provided for it in the budget.
25 But otherwise, there may be some inconsistencies.

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1 THE COURT: Well, it depends on what taxes you're
2 talking about. But I'm fine with the language as it is.

3 MR. TABACHNIK: All right. Thank you, Your Honor.

4 THE COURT: And this language has -- this DIP
5 order has the language dealing with the Texas ad valorem
6 rights with the account and all --

7 MR. SINGH: Right.

8 MR. TABACHNIK: Well, they grafted from the going
9 out of business and --

10 THE COURT: Right.

11 MAN 1: -- the de minimis sales.

12 THE COURT: Right.

13 MR. TABACHNIK: And those cover store closings to
14 the extent that there are stores not closing. And, you
15 know, prospective taxes that have to be paid, then that
16 would come under the tax order and the budget and the
17 preexisting liens.

18 THE COURT: Okay.

19 MR. SINGH: Okay, Judge, I think that's it on the
20 objections unless somebody stands up. Because I think that
21 was a vendor's taxing -- sorry, never mind.

22 (Laughter in the Courtroom)

23 MR. TENZER: Good afternoon, Your Honor. Andrew
24 Tenzer of Paul Hastings on behalf of Great American. I
25 actually don't have an objection, but I did want the

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1 opportunity to speak to the Court. I will not speak to the
2 Court about the process that the Debtors engaged in today,
3 in which after negotiating with us around the clock for two
4 weeks, they went with another lender. And I have too much
5 respect for the Court to burden the Court with what in all
6 likelihood be a fruitless objection based on the selection
7 that they made. I just did want to make two things very
8 clear for the record.

9 One is for whatever reason the Debtors have chosen
10 to go with the Cyrus loan. It was not because Cyrus offered
11 better terms. Great American remained ready, willing, and
12 able to loan on the terms that we negotiated and the
13 documents that were presented to Your Honor and that were
14 read in the record today. And I just want to make that
15 clear. The Debtors made a different selection; Great
16 American did not walk from the deal. And the other issue --

17 THE COURT: All right. The record's clear that
18 you didn't walk from the deal.

19 MR. TENZER: Right. The other issue, Your Honor,
20 is obviously Your Honor has a large pile of papers, all with
21 Great American's name on them. We have spent a lot of time
22 and effort and money negotiating those. A lot of people,
23 both at my firm, a financial advisor, and my client have put
24 in a lot of work that really enabled the Debtors to get to
25 this point. We hope we can have discussions with the

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1 Debtors and the other parties in the case about that issue.
2 But to the extent that issue doesn't get resolved, I just
3 wanted to reserve all of Great American's rights and those
4 who worked for it. Thank you.

5 MR. STIEGLITZ: Your Honor, for the record,
6 Richard Stieglitz from Cahill Gordon and Reindel. I
7 represent an entity called SHLD Lendco, LLC, which holds
8 about \$30 million of the Debtor's IP ground lease loan,
9 which is the group of loans that the Debtor calls pre-
10 petition, unencumbered collateral, which they purport not to
11 prime in connection with the DIP order. We filed an
12 objection and we continue to object because we believe the
13 carve-out is priming our liens.

14 And of course they could do that with our content,
15 and we're not willing to consent to it. Or they could
16 provide adequate protection. I actually don't believe they
17 can provide adequate protection because of the way the loan
18 is structured. We would suggest that the carve-out needs to
19 be junior to those liens. It would still be senior to the
20 DIP liens, which is frankly the appropriate place for a
21 carve-out to go. And we continue to have our objection
22 regarding that issue.

23 Your Honor, if it helps, I can show you
24 specifically in the DIP order where it comes up.

25 THE COURT: Well, the carve-out -- I'm familiar

1 with your objection.

2 MR. STIEGLITZ: Okay. Thank you, Your Honor.

3 THE COURT: Okay. Why don't we deal with that
4 objection first?

5 MR. SINGH: Yeah, I was just going to say. We've
6 been trying to resolve this, but I'm just not sure we can or
7 we agree. I mean, they are going to benefit from the carve-
8 out.

9 THE COURT: Well, you know the way 506(c) or 552--

10 MR. SINGH: Exactly. So --

11 THE COURT: So that's -- I mean, that's really to
12 me the answer.

13 MR. SINGH: Where this is going to get addressed.

14 THE COURT: I think that's where it will get
15 addressed. It probably, you know -- I don't know what the
16 allusion to where we are -- I mean, one of my questions was
17 is this really a lien where there's actual value or it even
18 matters. I don't know.

19 MR. SINGH: Your Honor, again --

20 THE COURT: to put it differently, the senior
21 lenders' carve-out is only for the benefit of those who
22 would get the carve-out. It's not as if the value that they
23 have carved out would go to your clients.

24 MR. STIEGLITZ: Agreed a hundred percent. But
25 that doesn't get around what 364 says.

1 THE COURT: No, I understand that. I'm just
2 trying to figure out economically whether this really
3 affects the people who are the beneficiaries of the carve-
4 out.

5 MR. STIEGLITZ: I don't think it does, Your Honor.
6 I mean, they're carving out from the ABL liens.

7 THE COURT: Right, I understand.

8 MR. STIEGLITZ: Those are the best liens. I --

9 THE COURT: It's kind of a rhetorical question.

10 MR. STIEGLITZ: Okay, yeah.

11 (Laughter in the Courtroom)

12 THE COURT: Okay.

13 MR. STIEGLITZ: I mean, Your Honor, we're not
14 trying to improperly impose, you know, an allocation to --

15 THE COURT: Right.

16 MR. STIEGLITZ: -- their collateral and, you
17 know, put all the fees in front of their collateral. I
18 mean, I think if Your Honor would say look, we'll deal with
19 this in the context of a 506(c) issue --

20 THE COURT: Right. Which may be -- it struck me
21 that this might be an out-of-the-money secured creditor.

22 MR. STIEGLITZ: Which I think --

23 THE COURT: And if that's the case, it doesn't
24 really matter. And if they're in the money, there's
25 probably a 506(c) that would cover the same thing as the

1 carve-out.

2 MR. STIEGLITZ: Right. I --

3 THE COURT: So I think -- I don't know if you've
4 suggested language to fix this, but the fix should make it
5 clear that the carve-out is only for the benefit of the
6 carve-out parties at the same time to the extent of any
7 collateral that -- what's the abbreviation for your client?

8 MR. STIEGLITZ: SHLD Lendco, LLC.

9 THE COURT: SHLD Lendco is not -- the carve-out
10 isn't of their collateral. It doesn't come from its
11 collateral.

12 MR. SINGH: Right. Right. And our rights to deal
13 with that issue are --

14 THE COURT: Right.

15 MR. SINGH: So I think we can probably work out a
16 reservation.

17 MR. STIEGLITZ: Your Honor, I just don't think
18 it's a reservation of rights.

19 THE COURT: No, no. I'm just saying you're just
20 reserving rights under 506(c) and 552.

21 MR. SINGH: Yeah. And --

22 THE COURT: That's all. I think that's what Mr.
23 Singh was going to say as far as the reservation is
24 concerned.

25 MR. STIEGLITZ: They have -- a hundred percent,

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1 they have. But what I'm worried though is if this order
2 gets entered and my client's rights gets reserved, there's
3 still a carve-out in front of them. So if I have to come
4 back to you in six months, there's going to be a carve-out
5 there.

6 THE COURT: It's a carve-out from the senior
7 lender's collateral.

8 MR. STIEGLITZ: Not with the way Paragraph 15
9 reads right now. The carve-out is senior to my client's
10 liens and their priority.

11 THE COURT: But that can be fixed.

12 MR. STIEGLITZ: That's why I want to
13 (indiscernible).

14 THE COURT: But it's not for the benefit of your
15 client, either. If you move to combine those two things,
16 then I don't think there's a problem. Plus the reservation
17 of rights under 506(c) and 552.

18 MR. SINGH: Yeah. I think I understand, Your
19 Honor, that we're not coming in senior to their particular
20 collateral in the carve-out. Party's rights are reserved
21 under 506(c), but the carve-out is senior as to other
22 collateral.

23 THE COURT: Correct, correct. And if the ABL
24 lenders are going after this creditor's collateral, they're
25 free to. There's no carve-out for the benefit of that

1 creditor.

2 MR. STIEGLITZ: Not sure I understand that point,
3 but can I --

4 THE COURT: Well, they haven't waived their lien
5 rights except as to the carve-out. So they can still -- you
6 know, if you have shared collateral and they're first and
7 you're second, they can --

8 MR. STIEGLITZ: We do not share collateral.

9 THE COURT: Oh, okay. Fine. All right.

10 MR. STIEGLITZ: We don't have that situation. Now
11 I understand the point you're making. This is what I'm
12 worried about is -- and Mr. Singh and I have had
13 conversations about this for a while. And I think frankly
14 if -- and I completely appreciate you were working on bigger
15 issues. I think if we had some more time we would have
16 resolved this.

17 But Paragraph 15 of the DIP order right now, if it
18 gets entered, is going to have a senior lien that didn't
19 exist pre-petition ahead of my client and other people's --
20 I believe the gentleman behind me -- clients. And that's a
21 (indiscernible) by definition.

22 THE COURT: That's fine. I understand that. That
23 shouldn't be the case.

24 MR. STIEGLITZ: Okay. So if we're in a situation
25 where that lien moves down, whether it's for my client or

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1 for other people's, I don't particularly care there, that's
2 fine. And yes, the Debtor's rights are reserved. We're not
3 talking 506(c) here. And my rights are reserved to object
4 if they try to charge, a hundred percent. But I do think
5 that lien priority has to come down in that waterfall for
6 the Paragraph 16.

7 THE COURT: Okay.

8 MR. HALPERIN: Good afternoon, Judge.

9 THE COURT: Well -- I'm sorry -- it is carved out
10 of -- I mean, you don't have the same collateral, so it
11 doesn't matter. But they still have the lien priority as to
12 stepping into the ABL lender's shoes.

13 MR. STIEGLITZ: With consent of the ABL lenders.

14 MR. SINGH: Your Honor, I think we can just work
15 out a specific paragraph with them --

16 THE COURT: Okay.

17 MR. SINGH: -- on their collateral. I cut off
18 what Mr. Halperin was about to say on his collateral.

19 Right?

20 THE COURT: Okay.

21 MR. SINGH: So that on those two particular pieces
22 we understand they're not consenting, but we can come back
23 on 506(c) and deal with that issue.

24 MR. HALPERIN: Yes.

25 THE COURT: Okay. But you'd better state who your

1 client is, just for the record.

2 MR. HALPERIN: Yes, Your Honor. Good Afternoon,
3 Your Honor, Alan Halperin on behalf of -- and I've got to
4 read it because I'll never get it right -- the relater Paul
5 Ireland, administrator of the Estate of James Garbe.

6 Two issues. One was resolved, one I think was
7 just resolved now. One was just confirming that we are a
8 senior permitted lien now under the definition subject to
9 the Debtor's right to challenge the liens. If they have a
10 problem with it, that's fine. We have an issue with the
11 fact that the carve-out was senior. That's now been
12 resolved. Their 503(c) rights are reserved. We thought
13 that was the way they could go after it and we thought it
14 was appropriate. As long as we change the language that the
15 carve-out isn't senior and they reserved their rights as
16 we're talking about, I think we're good, and I'll just sit
17 down.

18 THE COURT: Okay. And that's for Mr. Ireland.

19 Okay.

20 MR. HALPERIN: Thank you.

21 MR. SINGH: Your Honor, this hearing has gotten a
22 little unorthodox, but I think I'd like to now move into
23 evidence and the declarations. I think that's it.
24 (indiscernible) the agenda.

25 So, Your Honor, we did file a few declarations.

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1 And just for purposes of completeness, I will include the
2 declarations that we had at the time of the interim DIP
3 hearing, because I think that those are still relevant.

4 THE COURT: Okay.

5 MR. SINGH: And so, Your Honor, that's the
6 declaration of Brandon Aebersold of Lazard, the Debtor's
7 investment banker, at ECF9 in his supplemental declaration
8 at ECF865. We have the declaration of Mohsin Meghji at
9 ECF10, and we have the supplement -- we have the first day
10 declaration of Rob Ricker of the company, of the office of
11 the CEO, and Mr. Riecker's supplemental declaration at
12 ECF866. So I would like to move all of those into evidence.
13 All three are here today and available for live cross-
14 examination. And they did file those declarations with the
15 Court.

16 THE COURT: Okay. I skimmed, having read
17 originally the declarations for the interim hearing, and
18 skimmed them again. And I've read the Aebersold declaration
19 and Mr. Riecker's declaration that were filed just a few
20 days ago. Does anyone wish to cross-examine any of the
21 declarants? Okay, I'll admit each of those declarations in
22 the order that you proffered them.

23 (Debtor's Declarations Admitted Into Evidence)

24 MR. SINGH: Thank you, Judge. Your Honor, I'm not
25 going to recite what's in all of the papers and the

1 declarations. I think we've made a couple of things
2 abundantly clear, is that the Debtors absolutely need, you
3 know, the cash that's coming in from the two DIP facilities.
4 We've run an extremely robust process.

5 The Lazard team has contacted probably over a
6 hundred people with respect to both facilities combined, and
7 we do think that the terms available, especially now after
8 the bidding that has gone outside -- gone on in the hallway,
9 made clear that we are getting the best reasonable and most
10 reasonable financing available, particularly now with the
11 UCC support.

12 We believe this is all in the Debtor's business
13 judgement and we've satisfied the obligations under Section
14 364 for approval of the financing. It's a very complicated
15 package, but it did all come together, and we think the
16 Debtor's estates will benefit from the financing that's been
17 recited in the papers and as modified.

18 So unless, Judge, you have questions remaining,
19 you know, we would ask that you approve the Debtor's motion
20 on a final basis with respect to the senior DIP on an
21 interim basis with respect to the junior DIP.

22 The one piece that's in the senior DIP that's
23 interim is the cascade loan treatment, Paragraph 60, which
24 we'll make in the order. That's interim. But we would ask
25 that you authorize that as recited on the record and

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1 modified. We have to get you revised orders of course to
2 incorporate all of the changes that have occurred here. But
3 we would appreciate if Your Honor has any questions or if
4 Your Honor would approve the motion as modified.

5 THE COURT: Okay. Mr. Fox, did you have some...?

6 MR. FOX: We didn't get back to the
7 clarifications.

8 MR. SINGH: Oh, I'm sorry.

9 THE COURT: Oh, okay.

10 MR. FOX: Just briefly, Your Honor. Edward Fox,
11 from Seyfarth Shaw, on behalf of Wilmington Trust National
12 Association as Indenture Trustee and Collateral Agent for
13 the 6.58 percent senior secured notes due 2018.

14 Your Honor, first, I'd just asked Mr. Singh to
15 confirm on the record that the Debtors will provide
16 Wilmington Trust with the same reports and information
17 required, I believe, under Paragraph 22 of the order, which
18 is the variance reports, the budgets, et cetera; the ongoing
19 reporting that's being provided to the first lien UBL and to
20 the Creditors' Committee.

21 MR. SINGH: Yes, Your Honor, we'll do that.

22 THE COURT: Okay.

23 MR. FOX: Okay. And secondly, Your Honor, I just
24 wanted to clarify with respect to the payment of the current
25 fees of Wilmington Trust, it's the fees and expenses of

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1 Wilmington Trust, including the fees and disbursements of
2 its counsel, up to \$250,000. But just to be clear, that's
3 not to be considered a limitation ultimately on Wilmington
4 Trust's rights, either under 506(c) as a secured creditor
5 with respect to any unsecured claim it may have under the
6 indenture, with respect to its charging lien, or in the
7 highly unlikely event that it seeks to make a substantial
8 contribution claim.

9 THE COURT: Okay. And there's a -- there's
10 obviously a mechanism, even with the capped amount as to
11 whether they're reasonable or not? Everyone's free to
12 object and say they aren't reasonable for some reason.

13 MR. FOX: Yes.

14 THE COURT: Okay.

15 MR BROMLEY: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MR. BROMLEY: James Bromley, of Cleary Gottlieb,
18 on behalf of ESL. Just a couple of minor things.

19 When Mr. Singh stood up at the beginning and
20 talked about the adequate protection for the second liens
21 and the package, I believe he mentioned liens. But the
22 package will also include super priority claims. So, I just
23 wanted to make that clear.

24 And with respect to the mechanics --

25 THE COURT: Well, they're not super, super

1 priority, though, right? They're -- they fit in as
2 described in the papers.

3 MR. BROMLEY: Absolutely.

4 THE COURT: Okay.

5 MR. BROMLEY: Absolutely, Your Honor.

6 THE COURT: All right.

7 MR. BROMLEY: And second is with respect to the
8 efforts that the Debtors and UCC will undertake with respect
9 to allocation of the fees and expenses, if necessary,
10 understanding that the mechanics will be put in place now,
11 but among those mechanics will be the tracing of the
12 proceeds of the inventory.

13 THE COURT: Right.

14 MR. BROMLEY: Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. LEAKE: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. LEAKE: Paul Leake, from Skadden, on behalf of
19 Bank of America and its ABL DIP agent.

20 First of all, I appreciated Mr. Singh's comments
21 at the very beginning of the hearing, saying that we needed
22 time to talk to our clients. We have in the interim, and I
23 just wanted to report that as to the three current DIP
24 lenders under the interim, and that's going to be syndicated
25 on a final basis, they're all okay in principle with the

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1 changes that have been described on the record by Mr. Singh
2 as to the settlement. All subject, of course, to reading
3 the documents and making sure we're satisfied with the
4 words.

5 There is one thing that I would like to have
6 clarified on the record by counsel for Cyrus. We've spent a
7 lot of time on the documents with respect to the Great
8 American DIP and the inter-creditor relationships, et
9 cetera. So, I would ask the counsel to Cyrus confirm that
10 they will in fact be stepping into the documents, as they
11 have been negotiated, subject to the changes that we've
12 talked about. In particular, I think with respect to the
13 inter-creditor agreement --

14 THE COURT: Okay.

15 MR. LEAKE: -- so we understand what our
16 relationship is going forward.

17 THE COURT: All right. I think we did that, but
18 if you could just reiterate that.

19 MR. KRELLER: Your Honor, Thomas Kreller, of
20 Millbank, on behalf of Cyrus. That's so confirmed. I think
21 we did it earlier. I'm happy to do so (indiscernible) --

22 THE COURT: Okay. Very well. Thanks.

23 All right. I had just one -- actually, I had a
24 number of questions. These resolutions that have been set
25 forth on the record dealt with all of them but one. And I'm

1 just not sure what this means.

2 If you look at Paragraph 59 of the proposed senior
3 DIP order, which is the setoff and recoupment provision, it
4 has this introduction that I'm not quite sure what it's
5 meant to do. It says, except as specifically set forth in
6 Paragraph 41(d) with respect to the prepetition ABL
7 obligations, setoff rights are preserved, and recoupment
8 rights. I'm not sure what the "notwithstanding" is aimed
9 at, because when you look at 41(d), it basically just
10 preserves the right to challenge, and then if there's no
11 challenge, then it's an allowed claim. So, I'm not quite
12 sure if there's anything else to that --

13 MR. SINGH: Judge, I think that --

14 THE COURT: -- reservation than that.

15 MR. SINGH: -- that can just be struck, as long as
16 -- I've been getting nods from the Skadden team, so that may
17 just be a stray reference at this point. But if you give me
18 a moment to just confer --

19 THE COURT: Okay.

20 (Counsel Confers)

21 MR. SINGH: Oh, oh, oh. Oh, sorry. Your Honor,
22 they just clarified. 41(d) says that the senior lender's
23 claim will not be subject to setoffs. So, basically, that
24 the estates and anybody else is not preserving rights to
25 setoff the claims on the senior lenders.

1 THE COURT: All right.

2 MR. SINGH: Which is what it says there.

3 THE COURT: All right. So, that's not --

4 MR. SINGH: It's not limiting --

5 THE COURT: -- a right to setoff a claim against
6 the Debtor?

7 MR. SINGH: Yeah.

8 THE COURT: All right.

9 MR. SINGH: Right.

10 THE COURT: Okay.

11 MR. SINGH: And it's not limiting, you know, other
12 people as to -- exactly -- setoff rights against the Debtor.
13 So, actually, I do think we leave that in there.

14 THE COURT: That's fine. I just wanted to make
15 sure I understood what that -- that wasn't intended to close
16 off someone's setoff rights against the Debtor, in other
17 words?

18 MR. SINGH: That's right. No, it was just --

19 THE COURT: Okay.

20 MR. SINGH: -- intended to close off someone's
21 setoff right against the senior lenders.

22 THE COURT: The senior lenders.

23 MR. SINGH: That's exactly right.

24 THE COURT: Okay.

25 MR. SINGH: So, Your Honor, I think with that,

1 that's everything we have.

2 THE COURT: Okay.

3 MR. SINGH: I know that's a lot on the DIP order -

4 -

5 THE COURT: All right.

6 MR. SINGH: -- senior and junior.

7 THE COURT: Well, I mean, I think actually the
8 record is quite clear on this. The parties had laid out
9 their objections clearly, and they've been appropriately
10 addressed.

11 There were a couple of objections that had raised
12 a concern that the winddown count and the budget wouldn't --
13 would not sufficiently protect the Debtors against
14 administrative insolvency. I'm pleased that the account has
15 been increased by \$40 million. I'm also pleased that no one
16 is pushing that issue at this point. They are closer to it
17 than I am, and I gather that they're reasonably satisfied on
18 that basis that these loans are going to benefit everybody.

19 I also had some concern that there might be a
20 potential standalone non-obligor Debtor? That's one of the
21 issues that the Committee had raised. The declarations went
22 a long way to addressing that concern. But again, I think
23 the way that this has been resolved with a sophisticated
24 Creditors' Committee with sophisticated advisors indicates
25 that that concern, while legitimate, is overshadowed by the

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1 need for the financing, as laid out, and that those
2 individual formerly non-obligor Debtors are not being unduly
3 burdened by this financing.

4 So, as I said, my questions have been resolved
5 based on what's been laid out on the record. As far as the
6 process is concerned, clearly, it seems to me to have been a
7 thorough one where the Debtors and their advisors considered
8 available alternatives and sought out, through a wide group
9 of parties, superior financing. And I'm fine with the
10 findings in the order as far as 364 is concerned.

11 So, after the necessary vetting of the documents
12 and the orders with the parties, which does not have to be a
13 settlement of order process, you can submit the orders to
14 chambers. And in the meantime, I think the parties, the
15 lenders, can rely upon the record today in extending
16 funding, including my finding that I'm comfortable with the
17 good faith findings in (indiscernible).

18 MR. SINGH: Thank you, Your Honor. Your Honor,
19 the next motion on the agenda is the cash management motion
20 that's being considered on a final basis. Your Honor --

21 THE COURT: Right.

22 MR. SINGH: --we've been speaking to the UCC about
23 it and we'd like to adjourn this motion, other than the
24 pieces about post-petition secured intercompany claims,
25 which we'll deal with in the DIP orders, right, because

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1 that's important to that resolution. But to ensure a couple
2 of things. You know, reporting we're still working out with
3 the UCC, but also the UCC did raise a concern that, you
4 know, money going out from Debtors to non-debtors to ensure
5 that there's appropriate protection that that's going out,
6 you know, on a secured -- senior secured basis so that there
7 is an ability to get those dollars back, or that there's
8 comfort that those dollars are going to come back.

9 Your Honor, we don't have an objection to that.
10 We're going to work through that issue with them. One of
11 them is -- you know, one of the entities is Sears. We're
12 not sending money that way, so whatever the regular basis
13 that the company used to previously. We just have to check,
14 you know, whether there's going to be a prohibition under
15 Bermuda law or something like that. We'll work through
16 those issues with the UCC. But we don't generally have an
17 objection to working this out.

18 And so, I think it would be helpful if we could
19 defer, you know, if Your Honor, we'll work with Ms. Lee, you
20 know, in a week or so we might even be able to settle the
21 order on your -- to Your Honor if we can resolve it with
22 them.

23 The one exception, Your Honor, we won't make any --
24 - you know, we will not make intercompany transfers out from
25 the Debtors' system -- intercompany loans, I should just

1 say, payments out from the Debtors' system to non-debtors
2 without their consent, just in case there is an emergency.

3 We don't --

4 THE COURT: In the interim?

5 MR. SINGH: In the interim, you know, during this
6 period --

7 THE COURT: Right.

8 MR. SINGH: -- of a week or two, because we don't
9 want, for example, you know, some payroll to be missed in
10 one of the foreign jurisdictions and we have another
11 operational issue on our hands.

12 THE COURT: All right.

13 MR. SINGH: So, we think will be able to work that
14 out --

15 THE COURT: So, you have a specific contact at the
16 Committee to talk to about that?

17 MR. SINGH: Yeah, well, I think we'll work through
18 the Akin team, Mr. Dublin --

19 THE COURT: Okay.

20 MR. SINGH: -- has been volunteered, I think.

21 (Laughter in the Courtroom)

22 THE COURT: All right.

23 WOMAN: Okay.

24 THE COURT: Okay.

25 MR. SINGH: -- to deal with those issues. So,

1 we'll be able to work through that, you know, hopefully,
2 pretty quickly --

3 THE COURT: Is the entry of that order on a final
4 basis a milestone? I don't think it is.

5 MR. SINGH: No, not the cash management order --

6 THE COURT: All right.

7 MR. SINGH: -- Your Honor, so --

8 THE COURT: Okay.

9 MR. SINGH: -- that's -- we don't think that's an
10 issue.

11 THE COURT: Okay.

12 MR. SINGH: And so, we'll work it out and be able
13 to get back to Your Honor on that particular issue.

14 THE COURT: Okay.

15 MR. SINGH: I think other than that, Judge, it's
16 really just the one motion, the 2004 motion that's on the
17 agenda, and I'll --

18 THE COURT: Right.

19 MR. SINGH: -- turn it over to counsel for this.

20 THE COURT: Okay.

21 MR. BROMLEY: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. BROMLEY: James Bromley, Clearly Gottlieb, on
24 behalf of ESL. As Your Honor is aware, we had filed an
25 application for the issuance of Rule 2004 subpoenas, both to

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1 the subcommittee of the Board charged with investigating
2 prepetition transactions, as well as to the UCC. We have
3 been in conversations both with the UCC and the
4 subcommittee, and the subcommittee has filed a response, as
5 has the UCC.

6 Your Honor, I think we've come to an agreement as
7 to how to proceed --

8 THE COURT: Okay.

9 MR. BROMLEY: -- in that the materials that have
10 been produced thus far have been produced entirely to the
11 subcommittee, and that we will issue a subpoena to the
12 subcommittee and not to the UCC.

13 THE COURT: Okay.

14 MR. BROMLEY: So, we will submit an order --

15 THE COURT: And the subcommittee is -- I didn't --
16 you said there were two responses. I just saw the
17 Creditors' Committee response. Was there another response?

18 MR. BROMLEY: There was a response from the
19 subcommittee as well.

20 THE COURT: But the subcommittee is comfortable
21 with that resolution?

22 MR. BROMLEY: That's my understanding, Your Honor.

23 THE COURT: Okay. All right.

24 MR. BROMLEY: We would submit an order after
25 consulting with those parties.

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1 THE COURT: Okay. That's fine.

2 MR. BRITTON: Good afternoon, Your Honor. Bob
3 Britton, of Paul, Weiss, Rifkind, Wharton & Garrison, on
4 behalf of the restructuring subcommittee.

5 That's accurate, Your Honor. You know, to date we
6 have shared most of the nonprivileged documents we received
7 through a data site with the committee. And what we've
8 effectively agreed is that we'll provide the same documents
9 to ESL, subject to an appropriate confidentiality agreement,
10 and ensuring that they've entered into appropriate
11 confidentiality agreements with third parties whose
12 documents are in those rooms -- are in the data room as
13 well.

14 THE COURT: And nonprivileged?

15 MR. BRITTON: And the -- we only placed
16 nonprivileged documents into that room, unless we, the
17 subcommittee, exercise our right to waive the privilege and
18 share it with the committee or other parties.

19 THE COURT: Okay.

20 MR. BRITTON: Thank you, Your Honor.

21 THE COURT: All right. I -- that's pretty much
22 where I was coming out on this. So, I'm fine with that
23 resolution. It may be as a couple of cases that have dealt
24 with this scenario, I've also said that as you get deeper
25 into this, there may need to be a further iteration of your

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1 orders or your stipulations. But for present purposes, that
2 resolution is fine.

3 MR. BRITTON: Thank you, Your Honor. We'll submit
4 an order.

5 THE COURT: Okay.

6 MR. SINGH: Thank you, Judge. I think that's it
7 for today's agenda. Again, thank you and your chambers for
8 your patience in allowing us to get this done consensually.

9 THE COURT: Okay. Very well. Thank you.

10 (Whereupon these proceedings were concluded at
11 2:41 PM)

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C E R T I F I C A T I O N

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3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

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